

**A Mohd Iftitah bin Ismail (administrator of the estate of
Allahyarham Ismail bin Barliar) v Dato' Hasan bin Malek**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
N-02(NCVC)(W)-955-06 OF 2015
HAMID SULTAN, UMI KALTHUM AND BADARIAH SAHAMID JJCA
2 SEPTEMBER 2016

C *Trusts and Trustees — Resulting trust — Purchase of land in name of another
— Respondent used deceased's name to purchase land — Loan obtained for
construction of building on property and respondent acted as guarantor — Total
costs for purchase and construction did not come solely from respondent*
D *— Respondent commenced action claiming resulting trust against appellant as
administrator of deceased's estate — Whether in law and in fact, there was
resulting trust*

E The respondent who was at the material time a Deputy Minister had used the
deceased's name purportedly as nominee to acquire the disputed property from
the state government. The deceased was the respondent's personal assistant. A
loan was obtained for the construction of a building on the property whereby
the respondent was the guarantor. Based on the evidence, the total costs for the
purchase and construction of the building did not come solely from the
F respondent and the bank officers for the loan knew that the property was
purchased for the benefit of the respondent. The respondent commenced an
action against the appellant as the administrator of the deceased's estate for the
property. The trial court allowed the claim and held that there was a resulting
trust, hence this appeal. The issue for determination was whether in law and in
G fact there was a resulting trust.

Held, allowing the appeal with costs of RM40,000 here and below subject to
allocatur and setting aside the judgment of the High Court:

H (1) The respondent had never established that the purchase of the property
was solely through his money. It was undisputed fact that a sum of
RM185,236 was the deceased's mortgage insurance money related to the
charge which was paid into the facility account. Further, the respondent's
witnesses ie the bank officers took the position that the property did not
I belong to the deceased but the bank was instrumental for procuring the
insurance coverage as a condition for granting the loan. The bank officers'
evidence was damaging to the standard which was expected to be
practised by the bank. Based on the evidence as a whole, the court should

not have entertained an equitable relief which was discretionary in nature when the general norms of equity had been violently breached (see paras 8–10 & 12).

A

[Bahasa Malaysia summary]

Responden yang pada masa material adalah Timbalan Menteri telah menggunakan nama si mati bagi tujuan sebagai calon untuk mendapatkan hartanah yang dipertikaikan daripada kerajaan negeri. Si mati adalah pembantu peribadi responden. Pinjaman diperolehi bagi pembinaan bangunan atas hartanah tersebut di mana responden adalah penjamin. Berdasarkan keterangan, kos keseluruhan bagi pembelian dan pembinaan bangunan tersebut tidak diperolehi semata-mata daripada responden dan pegawai-pegawai bank bagi pinjaman tersebut mengetahui yang hartanah tersebut dibeli bagi kepentingan responden. Responden memulakan tindakan terhadap perayu sebagai pentadbir estet si mati bagi hartanah tersebut. Mahkamah perbicaraan membenarkan tuntutan dan memutuskan bahawa terdapat amanah berbangkit, maka rayuan ini. Isu untuk penentuan adalah sama ada dari segi undang-undang dan fakta terdapat amanah berbangkit.

B

C

D

Diputuskan, membenarkan rayuan dengan kos sebanyak RM40,000 di mahkamah ini dan Mahkamah Tinggi tertakluk kepada alokatur dan menetapkan penghakiman Mahkamah Tinggi:

E

- (1) Responden tidak pernah membuktikan bahawa pembelian hartanah tersebut semata-mata melalui wangnya. Ia fakta yang tidak dipertikaikan bahawa sejumlah RM185,236 adalah wang insurans gadaian si mati berkait kepada caj yang mana dibayar ke dalam akaun kemudahan. Selanjutnya, saksi-saksi responden iaitu pegawai-pegawai bank menyatakan bahawa hartanah tersebut tidak dimiliki oleh si mati tetapi bank adalah merupakan sebab bagi mendapatkan liputan insurans sebagai syarat untuk memberikan pinjaman tersebut. Keterangan pegawai-pegawai bank adalah merosakan kepada standard yang dijangka patut diamalkan oleh bank. Berdasarkan keterangan keseluruhannya, mahkamah tidak patut memberikan relif ekuiti yang mana adalah bersifat budi bicara apabila norma-norma umum ekuiti telah dimungkiri dengan jelas (lihat perenggan 8–10 & 12).]

F

G

H

Notes

For cases on purchase of land in name of another, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3275–3277.

I

Cases referred to

Datuk M Kayveas (as Public Officer for Parti Progresif Penduduk Malaysia Baru (PPP)) v Chong Chek Ah & Ors [2011] 9 MLJ 347, HC (refd)

- A** *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64, FC (refd)
Dyer v Dyer [1788] 2 Cox Eq Cas 92, HC (refd)
Isaac Iyadurai a/l Nallaperumal & 26 Ors v Vedha Ratnam s/o Valiappan & Anor [1993] 4 CLJ 149, HC (refd)
- B** *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)
Patel v Mirza [2016] UKSC 42, SC (refd)
Tneu Beh v Tanjong Kelapa Sawit Sdn Bhd & Ors And Another Action [1994] MLJU 366; [1995] 1 CLJ 741, HC (refd)

C

Legislation referred to

Evidence Act 1950 ss 91, 92

- D** **Appeal from:** Civil Suit No NCVC 22–153–09 of 2012 (High Court, Seremban)

Abdul Razak Ismail (Mohd Radzuan Ibrahim and Siti Noryani with him) (Radzuan Ibrahim & Co) for the appellant.

- E** *Manian Raju (Zatul Izra bt Zulkefelee and Elizabeth Low with him) (Krishna Dallumah, Manian & Indran) for the respondent.*

Hamid Sultan JCA (delivering judgment of the court):

- F** [1] The appellant/first defendant (the administrator of the estate of Ismail bin Barliar ('the deceased')) appeals against the decision of the learned High Court judge who held that there was a resulting trust when there was clear evidence to show that the respondent did not purchase the disputed property solely with his money.

G BRIEF FACTS

- H** [2] The plaintiff/respondent at the material time was a Deputy Minister and subsequently holding other state position had used the deceased's name purportedly as nominee to acquire the disputed property from the state government. The deceased at the material time was the plaintiff's personal assistant (whether such conduct is permissible under the law is a matter which the trial court ought to have taken cognisance for reasons stated below).

- I** [3] A building was constructed on the said property from a loan obtained wherein the property was charged by the deceased and the plaintiff was the guarantor. From the evidence, it was clear that the total costs for the purchase as well as the construction of the building did not come solely from the plaintiff. Notwithstanding the fact, the plaintiff was only a guarantor to the loan, the plaintiff managed to lead evidence through officers of the bank (SP2

and SP3) to say that the bank officers knew that the property was not the deceased's and it was purchased for the benefit of the plaintiff. Basically, the bank officers' evidence demonstrated that they had compromised the salient features of accountability, transparency and good governance when they took the position that is contrary to the facility agreement as well as the guarantee and the evidence would also impinge on several provisions of the Evidence Act 1950 ('the EA 1950') (see ss 91, 92, etc of the EA 1950).

A

B

[4] The conduct of the plaintiff as well as the bank officers per se attracts the concept of illegality as well as public policy. However, it was not the pleaded case of the first defendant and in consequence the learned trial judge did not deal with the issue though was bound to deal with such issues as was recently held by the Federal Court in the case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212. On the issue of illegality and public policy, the recent judgment of the Supreme Court of England in the case of *Patel v Mirza* [2016] UKSC 42 is instructive. In that case, Lord Toulson reiterated well established principles in this area of jurisprudence to say that:

C

D

- (a) no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act; and
- (b) illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment, and in a wide variety of circumstances.

E

[5] The learned counsel for the plaintiff/respondent described the clouded and/or sham transaction by the plaintiff who at the time was holding public office as follows:

F

- (a) the respondent used: (1) people's money to pay the loan (Tabung Kebajikan Dialisis Kuala Pilah); (2) the deceased's insurance amount of RM185,236 and RM2,699.88 to pay the loan; (3) the appellant's personal money amount of RM15,000; and (4) no evidence for another balance of RM400,000;
- (b) the respondent's allegation that the respondent used the deceased's name to apply and acquire the said land from the state government, the respondent paid the premium for the acquisition of the said land but the said land was registered in the name of the deceased; all of these are triable issues and it is not a fact. The deceased had already died and the court could not take statement only from the respondents;
- (c) reference to the respondent's position as assemblyman and member of parliament for obtaining loan from Maybank and using the deceased's name, a government servant, for the loan and to acquire the said land from the state government are absolutely wrong and illegal; and

G

H

I

A (d) the respondent's further submission at paras 2 and 3 are inconsistent with the judgment of the Federal Court per Jeffrey Tan FCJ in the case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212, and held (2) and (3):

B (2) Section 24 of the Act stipulated five circumstances in which the consideration or object is unlawful, namely, where (a) it is forbidden by law; (b) it is of such nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or (e) the court regards it as immoral or opposed to public policy. The considerations or objects referred to in paras (a), (b) and (e) of s 24 shall be unlawful and the agreement which ensues shall be unlawful and void.

C

D (3) It was plain and obvious that the consideration was unlawful and the letter of undertaking was void. On that ground, the claim should have been dismissed. An agreement, the object of which is to use the influence with the Ministers of Government to obtain a favourable decision, is destructive of sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy. It is immaterial if the persons intended to be influenced are not amenable to such recommendations.

E

F [6] We do not wish to labour on the issue of illegality or public policy as it is clear from the evidence that the plaintiff had not made out a case for resulting trust as per the pleaded cause of action. We do not wish to set out the facts and the evidence of the plaintiff and the bank officers as it has been partly dealt by the learned trial judge and the issue here is only whether in law and fact there arises a resulting trust. This judgment must be read with the judgment of the trial court to appreciate the facts in the right perspective.

G

H [7] We have read the appeal record and the submission of the parties. After much consideration to the submission of the learned counsel for the plaintiff, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(i) The learned plaintiff's counsel said that:

The pivotal issue

I The principal issue in this case is whether there is a resulting trust ie whether the deceased, Ismail bin Barliar (hereinafter referred to as 'the deceased') held the property under Hakmilik No PM883 Lot 7051 (formerly known as HS(M) 1884, PT 2285) Mukim Ulu Muar, Daerah Kuala Pilah, Negeri Sembilan Darul Khusus (hereinafter referred to as 'the said land') on a resulting trust for and on behalf of the plaintiff.

The law

A

If A buys a property using his own money and registers the property in the name of B, by operation of law, it is said that B holds the property on a resulting trust for A. This is actually a settled principle of law.

[8] The learned counsel for the plaintiff's proposition of law in respect of resulting trust subject to exception is correct. However, the plaintiff had never established that the purchase of the property was solely through the plaintiff's money.

B

[9] In the instant case, no reasonable tribunal properly appraised with the facts of this case will say that the said property was acquired through the money of the plaintiff. Very importantly it is an undisputed fact that a sum of RM185,236 was the deceased's mortgage insurance money related to the charge which was paid into the facility account.

C

D

[10] It must not be missed that the bank officers took the position that the property did not belong to the deceased but the bank was instrumental for procuring the insurance coverage as a condition for granting the loan. Had the insurance company known that the property was not the deceased's, the insurance company would have denied coverage based on the trite doctrine of insurable interest. As we have said earlier, the bank officers' evidence was damaging to the standard which was expected to be practised by the bank. The conduct of acquiring the insurance policy as well as receiving the money towards the loan in our view will also attract the concept of fraud and/or criminal conduct against the insurance company which evidence was revealed in this suit. In any event, it is clear from the evidence that it was not the plaintiff's money which was entirely used to secure the property.

E

F

[11] The leading English case which anchors the jurisprudence relating to resulting trusts is the statement of Eyre CB in *Dyer v Dyer* [1788] 2 Cox Eq Cas 92, where His Lordship said that the trust of a legal estate results to the man who advances the purchase price (see *Isaac Iyadurai a/l Nallaperumal & 26 Ors v Vedha Ratnam s/o Valiappan & Anor* [1993] 4 CLJ 149). In *Tneu Beh v Tanjong Kelapa Sawit Sdn Bhd & Ors and another action* [1994] MLJU 366; [1995] 1 CLJ 741, the court refused to find a resulting trust when the purchase money came from a common family fund.

G

H

[12] Taking a holistic account of the facts of the case as well as the clouded and/or sham conduct of the plaintiff as well as the bank officers, the court should not have entertained an equitable relief which is discretionary in nature when the general norms of equity had been violently breached. In addition, this is also not a case where the property was acquired through the sole money of the plaintiff (see *Datuk M Kayveas (as Public Officer for Parti Progresif Penduduk*

I

- A *Malaysia Baru (PPP) v Chong Chek Ah & Ors* [2011] 9 MLJ 347 (HC); *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64 (FC)).

[13] For reasons stated above, we allow the appeal with costs of RM40,000 here and below to the appellant/first defendant, subject to allocatur. The judgment of the High Court is set aside. Deposit is to be refunded.

We hereby order so.

- C *Appeal allowed with costs of RM40,000 here and below subject to allocatur; judgment of High Court set aside.*

Reported by Dzulqarnain Ab Fatar

D

E

F

G

H

I